

FIRST REGULAR SESSION

SENATE BILL NO. 365

97TH GENERAL ASSEMBLY

INTRODUCED BY SENATORS PARSON, DEMPSEY, RICHARD, JUSTUS AND HOLSMAN.

Read 1st time February 20, 2013, and ordered printed.

TERRY L. SPIELER, Secretary.

1630S.01I

AN ACT

To repeal sections 407.400 and 407.413, RSMo, and to enact in lieu thereof two new sections relating to alcohol franchise.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 407.400 and 407.413, RSMo, are repealed and two new

2 sections enacted in lieu thereof, to be known as sections 407.400 and 407.413, to
3 read as follows:

407.400. As used in sections 407.400 to 407.420:

2 (1) "Franchise" means a written or oral arrangement for a definite or
3 indefinite period, in which a person grants to another person a license to use a
4 trade name, trademark, service mark, or related characteristic, and in which
5 there is a community of interest in the marketing of goods or services at
6 wholesale, retail, by lease, agreement, or otherwise[, including]; **"franchise"**
7 **specifically includes**, but is not limited to, a commercial relationship of
8 definite duration or continuing indefinite duration, between a "wholesaler", such
9 wholesaler being a person as defined in this section, licensed pursuant to the
10 provisions of chapter 311 to sell at wholesale, intoxicating liquor, as defined in
11 section 311.020, to retailers, duly licensed in this state, and a "supplier", being
12 a person engaged in the business as a manufacturer, distiller, rectifier or
13 out-of-state solicitor whose brands of intoxicating liquor are distributed through
14 duly licensed wholesalers in this state, and wherein a wholesaler is granted the
15 right to offer, sell, and distribute within this state or any designated area thereof
16 such of the supplier's brands of intoxicating liquor, or all of them, as may be
17 specified, **with or without the grant of a license to use a trade name,**
18 **trademark, service mark, or related characteristic, and whether or not**

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

19 **there is a community of interest in the marketing of goods or services;**
20 **except that, the term "franchise" shall not apply to persons engaged in sales from**
21 **warehouses or like places of storage, other than wholesalers as above described,**
22 **leased departments of retail stores, places of original manufacture, nor shall the**
23 **term "franchise" apply to a commercial relationship that does not contemplate the**
24 **establishment or maintenance of a place of business within the state of Missouri.**
25 **As used herein "place of business" means a fixed, geographical location at which**
26 **goods, products or services are displayed or demonstrated for sale. It is the**
27 **general assembly's intent to make clear that this subdivision was**
28 **correctly interpreted as set forth in the Missouri cases of High Life**
29 **Sales Company v. Brown-Forman Corporation, 823 S.W. 2d 493 (Mo.**
30 **1992) and Brown-Forman Distillers Corp. v McHenry, 566 S.W. 2d 194**
31 **(Mo. 1978, rather than in Missouri Beverage Company, Inc. v. Shelton**
32 **Brothers, Inc., 796 F. Supp. 2d 988 (W.D. Mo. 2011), aff'd. 11-2456 (8th**
33 **Cir. February 28, 2012). Further, the general assembly declares that**
34 **this subdivision was not correctly interpreted in Missouri Beverage**
35 **Company, Inc. v Shelton Brothers, Inc., 796 F. Supp 2d 988 (W.D. Mo.**
36 **2011), aff'd 11-2456 (8th Cir. February 28, 2012);**

37 (2) The term "goods" includes any personal property, real property, or any
38 combination thereof;

39 (3) The term "other property" includes a franchise, license distributorship,
40 or other similar right, privilege, or interest;

41 (4) The term "person" includes an individual, corporation, trust, estate,
42 partnership, unincorporated association, or any other legal or commercial entity;

43 (5) The term "pyramid sales scheme" includes any plan or operation for
44 the sale or distribution of goods, services or other property wherein a person for
45 a consideration acquires the opportunity to receive a pecuniary benefit, which is
46 not primarily contingent on the volume or quantity of goods, services, or other
47 property sold or distributed or to be sold or distributed to persons for purposes
48 of resale to consumers, and is based upon the inducement of additional persons,
49 by himself or herself or others, regardless of number, to participate in the same
50 plan or operation; and

51 (6) The term "sale or distribution" includes the acts of leasing, renting or
52 consigning.

407.413. 1. If more than one franchise for the same brand or brands of
2 intoxicating liquor is granted to different wholesalers in this state, it is a

3 violation of sections 407.400 to 407.420 for any supplier to discriminate between
4 the wholesalers with respect to any of the terms, provisions, and conditions of
5 these franchises.

6 2. Notwithstanding the terms, provisions and conditions of any franchise,
7 no supplier shall unilaterally terminate or refuse to continue or change
8 substantially the condition of any franchise with the wholesaler unless the
9 supplier has first established good cause for such termination, noncontinuance or
10 change. **This subsection does not apply to a "supplier", being a person**
11 **engaged in the business as a manufacturer, distiller, rectifier, or out-of-**
12 **state solicitor whose brands of intoxicating liquor are distributed**
13 **through duly licensed wholesalers in this state who sells less than two**
14 **thousand five hundred cases of distilled spirits in the state, or who sells**
15 **less than ten thousand cases of wine in the state, the volume thresholds**
16 **being measured for the twelve months immediately preceding the date**
17 **on which the wholesaler receives notice of the termination,**
18 **noncontinuance, or change, provided such supplier shall be obligated**
19 **nevertheless, prior to the effective date of the termination,**
20 **noncontinuance, or change, to pay to the wholesaler an amount equal**
21 **to the fair market value of the distribution rights which will be lost or**
22 **diminished by reason of the termination, noncontinuance, or change,**
23 **including without limitation the actual laid in cost of any inventory on**
24 **hand and provided further that this exception shall only apply to a**
25 **termination, noncontinuance or change concerning the category of**
26 **intoxicating liquor (namely, distilled spirits or wine) that is less than**
27 **the volume threshold set forth in this sentence. The exception in the**
28 **preceding sentence shall not affect a supplier's obligation to satisfy the**
29 **notice requirements set forth in section 407.405. For purposes of this**
30 **subsection, "fair market value" shall be determined in accordance with**
31 **the provisions of the written agreement, if any, between the supplier**
32 **and wholesaler, or if the written agreement between them does not**
33 **specify how fair market value is determined, then:**

34 (1) **For a supplier of wine who sells less than one thousand cases**
35 **of wine in the state in the twelve months immediately preceding the**
36 **date on which the wholesaler notice of the termination,**
37 **noncontinuance, or change, "fair market value" shall be equal to the**
38 **actual laid in cost of any inventory on hand plus two times the gross**
39 **profit earned by the wholesaler in the twelve month period preceding**

40 the notice or twelve times the monthly average gross profit for the
41 period of time the wholesaler served as a distributor for the supplier's
42 products if such time period is less than twelve months, and "gross
43 profit" shall mean net revenue less costs of goods sold, as calculated in
44 accordance with generally accepted accounting principles; and

45 (2) For a supplier of wine who sells at least one thousand cases
46 but less than ten thousand cases of wine in the state in the twelve
47 months immediately preceding the date on which the wholesaler
48 receives notice of the termination, noncontinuance, or change, and for
49 a supplier of distilled spirits that sells less than two thousand five
50 hundred cases of distilled spirits in the state in the twelve months
51 immediately preceding the date on which the wholesaler receives
52 notice of the termination, noncompliance, or change, "fair market value"
53 shall be determined by agreement of the supplier and wholesaler, but
54 if the parties cannot so determine within thirty days after the notice,
55 then the matter shall be submitted to mandatory arbitration before a
56 panel of three neutral arbitrators conducted pursuant to chapter 435
57 or the Federal Arbitration Act if the latter so applies, with the parties
58 to the arbitration each to bear their own attorneys' fees and costs of
59 the arbitration.

60 3. Any wholesaler may bring an action in a court of competent jurisdiction
61 against a supplier for violation of any of the provisions of this section and may
62 recover damages sustained by such wholesaler together with the costs of the
63 action and reasonable attorney's fees.

64 4. In any action brought by a wholesaler against a supplier for
65 termination, noncontinuance or substantial change in violation of the provisions
66 of this section, it is a complete defense for the supplier to prove that the
67 termination, noncontinuance or change was done in good faith and for good cause.

68 5. As used in this section, "good faith" is the duty of each party to any
69 franchise and all officers, employees or agents thereof to act in a fair and
70 equitable manner towards each other, and "good cause" means the following:

71 (1) Failure by the wholesaler to comply substantially with the provisions
72 of an agreement or understanding with the supplier, which provisions are both
73 essential and reasonable;

74 (2) Use of bad faith or failure to observe reasonable commercial standards
75 of fair dealing in the trade; or

76 (3) Revocation or suspension for more than thirty-one days of a beer
77 wholesaler's federal basic permit or of any state or local license required of a beer
78 wholesaler for the normal operation of its business.

79 6. As to brewers and beer wholesalers, the provisions of this section shall
80 only apply to agreements entered into on or after August 28, 1998, and to
81 agreements which are renewed or substantially amended on or after August 28,
82 1998. As used in the preceding sentence, "substantially amended" means a
83 written amendment that materially alters the fundamental business relationship
84 between brewer and wholesaler. "Substantially amended" does not include
85 changes or amendments that are contemplated in writing by the parties to an
86 agreement.

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Bill

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